Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber	)	
Carrier Selection Changes	)	
Provisions of the	)	
Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of	)	
Consumers' Long Distance	)	
Carriers.	)	

PETITION FOR RECONSIDERATION OF THE SECOND REPORT AND ORDER BY THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Pursuant to 47 CFR § 1.429, the National Association of State Utility Consumer Advocates (NASUCA)[1] herewith respectfully requests reconsideration of the below-identified portions of the Commission's Second Report and Order (Order), released in this docket on December 23, 1998 as FCC 98-334 and published in the Federal Register on January 18, 1999. NASUCA has also separately submitted comments in response to the Further Notice of Proposed Rulemaking included in FCC 98-334.[2]

[1] NASUCA is an association of 42 consumer advocate offices in 39 states and the District of Columbia. Our members are designated by laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] As will be seen, NASUCA's comments on "Recovery of Additional Amounts from Unauthorized Carriers" (Order ¶¶140-144) stem directly from Points 1 and 2 of the request for reconsideration.

REQUESTS FOR RECONSIDERATION:

Point 1: The Commission ordered that consumers' payments on bills containing charges for slammed service go to the authorized carrier (Order ¶ 5; § 64.1100(d)), despite the fact that the authorized carrier provided no service to the slammed customer. This was error. The Commission should require the unauthorized carrier to pay the authorized carrier for lost revenues during the period of the slam. The subscriber should have no liability for charges from the slamming carrier, and should have any payments for slammed calls refunded.

Point 2: The Commission ordered that only customers who have not paid their bills will be absolved of payment for the first thirty days of slammed service (*id.*), regardless of the period during which the slamming carrier provided service to the slammed customer. This was error. The period of absolution from paying for slammed service should be as long as the period during which carriers are required to retain records of carrier change authorizations, and should apply equally to subscribers who have paid their bills and those who have not.

Point 3: The Commission established an elaborate process (*id.*) -- caused principally by the requirement that customer payments benefit the authorized carrier -- without adequate provisions for subscriber notification of the details of the process. This was also error. If the Commission maintains this process -- which it should not -- there must be assurance of adequate customer notice.

ARGUMENT

I. Introduction

The Commission has established rules and processes for dealing with unauthorized changes in customers' carrier selections. By and large, these rules are a substantial advancement in consumer protection against slamming. Yet certain aspects of the rules do not adequately reflect the reality of the systems currently used by telecommunications carriers. Let us examine what happens in a slam:

The executing carrier changes the subscriber's PIC from the authorized carrier to an unauthorized carrier (the "slammer").

In the vast majority of circumstances, the executing carrier has also billed the subscriber for the services provided by the authorized carrier, and will bill the subscriber for the service provided by the slammer.[3] Payments for the service will thus go to the executing carrier. (In fact, in most instances, the executing carrier will, as part of the inter-carrier billing and collection arrangements, have actually bought the accounts receivable of both the authorized carrier and the slammer.)

The first time that the subscriber would be likely to realize that the slam has occurred is when the first bill arrives from the executing carrier.[4] Or the subscriber might not notice the slam until a later bill.

Once having discovered the slam, the consumer may contact either the executing carrier, the slammer, or the authorized carrier. (Assume that the telephone numbers or other form of contact are on the bill or otherwise accessible.) Or the customer may contact the state utility commission, the FCC, or a state utility consumer advocate.

Depending on the results of that discussion, the subscriber will be returned to the authorized carrier's service within some time after the discussion. (How long will depend upon the efficiency of the carriers' change process.) Until then, service will be provided by the slammer, with charges likely billed by and paid to the executing carrier.

Under this process, certain principles become clear:

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[3] The description following assumes this typical pattern. The Commission's rules on slamming should focus on protecting consumers in this most common of circumstances. Adjustments for other billing patterns should be made.

[4] Other circumstances in which a slam would be noticed might include cancellation of a calling card.

First, the authorized (presubscribed) carrier should not be able to collect from the slammed consumer for service during the slam. The authorized carrier did not carry the calls for which the consumer is billed during the period of the slam, hence provided no service for which the consumer should be obligated. The slamming carrier, on the other hand, deprived the authorized carrier of revenues the authorized carrier has a right to expect to receive; hence the statutory requirement of reimbursement from slammer to authorized carrier. 47 U.S.C. § 258(b). Thus the Commission's decision requiring subscriber payments before the thirty days to go to the authorized carrier, and obligating the subscriber to the authorized carrier after thirty days, lacks logical support.

Further compounding this error, as discussed below, the Commission also erred by adopting a complex procedure without adequate requirements for consumer education and notification. Under the Commission's process, there are many questions about things the consumer has to know -- as well as questions about who will tell him.

II. The Commission's requirement that subscribers are obligated to pay the authorized carrier for service provided by the slammer is unreasonable.

The crucial portion of the Order at issue here is as follows: "[A] subscriber will be absolved of all liability for all calls made within 30 days after being slammed. If, however, the subscriber fails to notice that he or she has been slammed and pays the unauthorized carrier for such calls, section 258(b) of the Act requires the unauthorized carrier to remit such payments to the authorized carrier." Order ¶ 5; see § 64.1100(d).

Actually, § 258(b) may apply in only a few cases, at least where long distance slamming is concerned. It applies where the carrier that has violated the Commission's verification procedure "collects charges … from a subscriber…" Most long distance billing still is performed by the LEC on behalf of the IXC. In this situation, has the unauthorized carrier collected from the subscriber at all, or has the customer paid the LEC? In some states, in fact, LECs purchase the accounts receivable of the IXCs they bill for -- *thus the slammer will have already been paid, by the LEC,* for the calls being billed, prior to the customer making any payment on the bill.

On its face, then, § 258(b) would only apply when the customer has remitted payment directly to the slamming carrier. This will likely be only when the slamming carrier bills the customer directly. Hence only in that situation will the refund language of § 258(b) benefit the authorized carrier, leaving the vast majority of situations outside the bounds of the statute. It is substantially more likely that a customer will unwittingly pay a line item on the LEC's bill than pay a separate bill from the slamming carrier, thus making § 258(b) even less often applicable.

The Commission in effect holds that § 258(b) prevents refunds to the customer. Even where § 258(b) applies, the language of the statute does not support the Commission's conclusion. The statute says that the unauthorized carrier that collects charges from a subscriber "shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation…." Congress did not say -- as it might have -- that all payments by the subscriber to the unauthorized carrier should be transferred to the authorized carrier; instead, Congress established an independent liability between the slammer and the authorized carrier.[5]

Another reason why subscribers should not have to pay the authorized carrier for slammed calls is that, as the Commission itself notes (Order ¶ 20), such payment "would

[5] The Conference Report on the Act states, in its discussion of this section, "It is the understanding of the conferees that in addition to requiring that the carrier violating the Commission's rules must reimburse the original carrier for forgone revenues, the Commission's rules should provide that consumers are made whole."

result in the authorized carrier being paid for service it never provided." Talk about a windfall for the authorized carrier -- expense-free revenue! See Order ¶ 27. Clearly, this does not give a proper incentive to the authorized carrier.

Under the new rule, if a customer inadvertently pays the unauthorized carrier, the only refund the subscriber may receive is the difference between the unauthorized carrier's charges for the calls made and the charges that would have been imposed by the authorized carrier for those same calls.[6] Further, if the "slamming period" lasts more than thirty days, the slammed subscriber is liable to the authorized carrier for all calls after the thirty days (albeit at the authorized carrier's rates). The Commission imposes both of these requirements despite the fact that the authorized carrier has provided no service. Yet the *victim* of slamming should not be required to provide the authorized carrier its forgone profits; that responsibility properly lies with the slammer.[7]

Under the typical arrangement -- where the subscriber has paid the executing carrier, which has bought the accounts receivable of the unauthorized carrier -- the executing carrier should be the pivot point for the reimbursement of the slammed subscriber. If the LEC is required to reimburse the subscriber for amounts billed for a slammer, this will give the LEC incentive to ensure that the carrier changes it executes are properly authorized. *Cf.* ¶ 20, where the Commission supports requiring subscribers to pay charges after thirty days "because it provides consumers with an incentive to scrutinize their monthly telephone bills early and carefully."

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[6] Even that refund, as the Commission acknowledges, is contingent upon the authorized carrier pursuing its claim against the unauthorized carrier. Order ¶ 40.

[7] If the Commission accepts NASUCA's view on reconsideration, the issues raised by Part I of the FNOPR are rendered irrelevant. The Commission proposes requiring double payments from the unauthorized carrier to the authorized carrier, which then forwards a refund to the subscriber. Instead, the unauthorized carrier should be required to pay the authorized carrier for its forgone revenues, and should be required to provide a refund to the subscriber, if the subscriber has paid the bill. This would be a true disincentive against slamming and a true incentive to keep good records.

III. The Commission's rationale for imposing subscriber liability for slammed service after thirty days is inadequate.

The Commission justifies requiring payment from the subscriber for the service provided by the slammer after thirty days (where the customer has not already paid) by saying it creates the incentive for consumers to examine their bills carefully. (If the customer has been good enough to pay for the service, he will receive *less* benefit from the rule. Here again, this does not provide a proper incentive.)

The Commission imposed this requirement without also requiring that the carriers (all carriers!) inform their customers -- at least once -- that if they do not scrutinize their bill, they may have to pay for service by an unauthorized carrier. Unless consumers are informed of it, how can there be an incentive?

As an additional rationale, the Commission made the subscriber liable for calls carried by the slammed carrier beyond thirty days because of "the possibility of consumers improperly reporting that they were slammed in order to obtain free service." ¶ 22. Under what circumstances could such dishonesty be likely, or even possible?

Implicit in the Commission's decision is, first of all, some notion that the differential benefit of more than thirty days free service -- rather than only thirty days -- is such as to cause a dramatic increase in the numbers of subscribers ready to lie about whether they had been slammed. More importantly, in order for the "improper reporting" to have any chance of success, the accused unauthorized carrier's record-keeping must be shoddy enough not to allow disproof of the accusation, despite the very substantial tightening of the change process accomplished in this Order. See ¶¶ 22, 58-80. If carriers need incentive enough to secure proper authorization under the Commission's rules, the prospect of losing all revenues indefinitely should do the trick.

The Commission itself recognizes that "subscribers may only be absolved of liability if they have in fact been slammed." Order ¶ 22. The thirty-day limitation is thus an unnecessary preventative to fraud.

The Commission's rule also assumes that billing is monthly and that monthly bills accurately reflect calling for the previous month. Not all telephone bills are monthly; more importantly, errors on bills and delayed billing are not uncommon. Here again, this is really a problem only because of the thirty-day limitation.

Such artificial limits on absolution should be eliminated. Yet carriers cannot reasonably be expected to retain records forever. The period of absolution from paying for slammed service should be as long as the period during which carriers are required to retain records of carrier change authorizations. The Commission has set that period at two years. § 64.1100(a)(1).

As further justification for setting the thirty-day limit, the Commission says that "in most cases, the consumer will discover the unauthorized change upon receipt of the first monthly bill[8] after the unauthorized change occurs...." Order ¶ 23.[9] Hence most consumers -- at least the bill-scrutinizing ones -- will not be affected by the thirty day limitation. The thirty-day limitation will cause only the informationally disadvantaged, or those too preoccupied with life to suspect that someone would want to steal their chosen long distance carrier from them, to have to pay for calls carried by the thief.[10]

The Commission acknowledged the need for waiver of the thirty-day rule. Order ¶ 24. Yet it is unclear how the subscriber will know that "special circumstances" can justify such a waiver. It appears that only those subscribers with lawyers, or those savvy enough to read the instant order, will be able to argue for a waiver.

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[8] This assumes that all carriers provide monthly bills.

[9] The Commission states, "As explained above, we conclude that a 30-day limit is reasonable because subscribers generally discover within one month that an unauthorized change has occurred." ¶ 24. Actually, the explanation is absent from the order, as is any citation to the record that -- even if it were relevant -- subscribers "generally" discover a slam within thirty days.

[10] Perhaps this (the term "thief") is too harsh. Yet it is also inappropriate to require subscribers to pay for the service of a carrier that only inadvertently supplanted the subscriber's choice of carrier.

IV. Summary on payment requirements

The imposition of liability on the subscriber after thirty days of service makes little sense -- especially where the payment goes to a carrier that provided no service for the calls in question.[11] This makes all the more unreasonable the fact that the customer notification for the complex process created in the order is almost certain to be inadequate.

The customer should have no liability for the service provided by the slamming carrier.[12] Thus if the customer has not paid the bill for that service,[13] neither the slamming carrier nor the authorized carrier should be able to assert a claim for payment from the customer.

Where the subscriber has inadvertently paid a bill for the service provided by the slammer, those funds should be returned to the subscriber.[14] The slammer has no entitlement to the money; neither does the authorized carrier have any entitlement, because the authorized carrier has provided no service. 47 U.S.C. § 258(b) creates an *additional* obligation on the slammer to pay the same amount to the customer's authorized carrier, which should not supplant the right of the subscriber -- having inadvertently paid -- to a refund from the slammer.

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[11] Of course "[s]everal carriers support a 30-day limit to absolution." ¶ 23. The thirty day limit protects both those who slam and those who have their presubscribed customers taken away. Experience shows that a particular IXC can fall into either category at any time.

[12] At its 1997 annual convention in Boston, Massachusetts, NASUCA adopted a resolution which, *inter alia*, recommended that federal policy provide "for slammed consumers to be exempt from any payment requirement...."

[13] Whether that payment is to a billing LEC or directly to the slamming IXC.

[14] This is especially true where the LEC bills for the IXC.

V. The customer notification provisions in the rules are inadequate.

The Commission has addressed consumer notice piecemeal, to be applied sporadically throughout the process. Totally lacking is any requirement of notice to the consumer, all at once, of the rights provided under the Commission's slamming rules.

Further, the complex process adopted by the Commission is fraught with opportunities for consumer misinformation and lack of information. For example, one specific notification requirement is that any carrier called by the subscriber and informed of an unauthorized change is required to inform the subscriber that the subscriber is not required to pay for any charges imposed by the unauthorized carrier for the first 30 days after the unauthorized change. This obligation is placed on the authorized carrier, the executing carrier, and the unauthorized carrier. Order ¶ 18; § 64.1100(d). To begin with, it is unclear who determines when the slam occurred and how the customer will learn that date.

Equally importantly, although it is to be expected that the authorized carrier would inform the customer of the thirty day period as part of a "win-back" process, and there appears to be no reason why the executing carrier would not provide this information, the situation is different for the unauthorized carrier. It strains credulity to think that the very carrier that will likely be challenging the subscriber's claim of an unauthorized switch -- and asserting that the switch in fact was authorized -- will in the next breath inform the subscriber that the subscriber need not pay for the service. Here again, it is unclear who will monitor such conversations. If the unauthorized carrier does not inform the customer, is the customer likely to obtain this information anywhere else?[15]

[15] Note that this problem arises with any informational obligation placed on the unauthorized carrier, emphasizing the need for other forms of public notice. The problem is reduced by inter-carrier notice provisions, because they are likely to be more "business-like," even "routine."

Another area where customer notice is likely to be lacking is in § 64.1100(d)(1). That rule requires that after being returned to the authorized carrier, the subscriber must not only pay the authorized carrier but pay the authorized carrier at only the authorized carrier's rates, not the unauthorized carrier's rates. Then the subscriber must forward to the authorized carrier a copy of any bill that contains charges by the unauthorized carrier for service after the thirty day absolution period. (The calls are then rerated by the authorized carrier and billed to the subscriber.) In contrast to the Commission-ordered notice of the absolution period, any requirement of notice of these obligations imposed on the subscriber is totally lacking.[16] (In fact, the customer may no longer have a copy of the bill?[17]) And who will make the subscriber understand that he or she owes money to a carrier that did not provide any service?

Other questions include: Who will tell the subscriber when the slam will be fixed? Further, how long do the carriers have to perform the fix? (This apparently isn't part of the Commission's rules.) Recall that the obligation to forward the bill to the authorized carrier occurs after the subscriber has been returned to the authorized carrier.

Yet another area of inadequate notice comes where the authorized carrier informs the subscriber of its failure to receive payment from the unauthorized carrier, and informs the subscriber of his right to pursue a claim against the unauthorized carrier. § 64.1170(d). There is no requirement in the rule that the authorized carrier inform the subscriber of the reason for the failure to receive payment, especially where the failure stems from the authorized carrier's failure to pursue payment. See Order ¶ 40.

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[16] Not to mention the inevitable disputes over the rates charged by both authorized and unauthorized carriers.

[17] In fact, it should not be the subscriber's duty to obtain and provide, in most cases, a hard copy of the bill. The carriers' records should be able to establish the calls carried by the slammer.

VI. The complexity of the Commission's rules compounds the difficulty for the subscriber and the opportunities for misinformation.

The rule as to which reconsideration is sought here is § 64.1100(d), other than subparagraph (3). The complications necessitated by those three paragraphs, however, infect the rest of the anti-slamming provisions the Commission has adopted. The following summary of the process -- setting forth the subscriber's possible conditions -- demonstrates how convoluted the process becomes.

1) <u>Customer discovers slam within 30 days</u>

a) <u>Customer has paid the bill before contacting a carrier</u>

Customer notifies authorized carrier, unauthorized carrier, or executing carrier.[18] Customer is switched back to authorized carrier. (Only coincidentally will the bill have contained thirty days worth of slammed service. On customer's next bill, calls made within the thirty days after the slam will not appear.[19] Payment for calls after the thirty days must be paid, but will go to the authorized carrier. § 64.1100(d)(1).[20]) Authorized carrier requests proof of verification within 30 days of notification. § 64.1170(a). Unauthorized carrier either provides proof of authorization or payment. *Id.* If payment received, authorized carrier refunds difference between unauthorized carrier's rates and authorized carrier's rates to consumer (§ 64.1100(d)(2))[21]; if no payment, authorized carrier notifies subscriber within 60 days. § 64.1170(d).

b) <u>Customer does not pay the bill before contacting the carrier</u>

Customer notifies authorized carrier, unauthorized carrier, or executing carrier.[22] Carrier informs customer of right not to pay the first thirty days. § 64.1100(d). Unauthorized carrier removes charges from subscriber's bill. § 64.1180(b). (Only coincidentally will the unpaid bill contain thirty days worth of

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[18] The rule does not specify how the executing and unauthorized carrier will inform the authorized carrier of this.

[19] The rule does not specify who will inform the customer of this.

[20] The rule contains no notification requirement.

[21] The rule does not specify when this payment must be made.

[22] The rule does not specify how the executing and authorized carrier will inform the unauthorized carrier of the notification.

slammed service. Customer presumably pays the bill except for the removed charges. On the customer's next bill, the remainder of the thirty days will have been removed.[23] Payment for calls after the thirty days must be paid, but apparently will go to the authorized carrier.[24])Within 30 days of subscriber's return to authorized carrier,[25] unauthorized carrier can provide proof to authorized carrier and request for amounts removed. § 64.1180(c). If proof satisfactory, authorized carrier bills subscriber. § 64.1180(e)(1). When paid, amounts forwarded to "unauthorized" carrier. *Id.*

<u>2) Customer discovers slam after 30 days</u>

Customer has paid the first bill. Upon discovering slam, customer notifies authorized carrier, unauthorized carrier, or executing carrier.[26] Customer is switched back to authorized carrier. Authorized carrier requests proof of verification within 30 days of notification. § 64.1170(a). Unauthorized carrier either provides proof of authorization or payment. *Id.* If payment received, authorized carrier refunds difference between unauthorized carrier's rates and authorized carrier's rates to consumer[27]; if no payment, authorized carrier notifies subscriber within 60 days. § 64.1170(d).

The development of this description was done by an attorney experienced in telecommunications, and required careful scrutiny of the rule. The complexity of the process makes it highly unlikely that these details will be effectively communicated to an ordinary consumer who has suffered a slam, much less understood by that consumer. As previously noted, much of the complexity of the process is driven by the Commission's

[23] The rule does not specify who will inform the customer of this requirement.

[24] Again, the rule lacks a notification requirement.

[25] This implies that the subscriber's claim is enough to initiate the switchback. Realistically, though, what carrier would want to keep a customer that had accused the carrier of theft?

[26] The rule does not specify how the executing and unauthorized carrier will inform the authorized carrier of this.

[27] The rule does not specify when this payment must be made.

determination that subscriber's payments will be transferred to the authorized carrier. This alone is sufficient grounds for changing the rule.

VI. The Commission has the authority to absolve the subscriber of liability for slammed calls, and to require the executing carrier to be responsible for transferring funds to the subscriber and the authorized carrier.

The Commission recognized that the remedies in the rules go beyond the explicit remedy in § 258(b). Order, ¶ 29. The Commission found authority for the thirty-day absolution in § 201(b) and § 4(i). *Id.* Freeing customers from having to pay for slammed service also deters slamming, by even more strongly limiting the ability of carriers to profit from unauthorized changes. *Id.* And, as with the thirty-day window, refunding customer payments for slammed service is not inconsistent with § 258(b), because that section creates an independent liability between the authorized and the unauthorized carriers. *Id.*

VII. Conclusion

The Commission should reconsider the rules' provisions on absolution. The rules' provisions reward the authorized carrier at the expense of the victim of slamming, and provide inadequate disincentives to slammers. Instead of the structure in the rules, the following should happen after a slam:

The customer provides notice of the slam.

If the notice is to the executing carrier, the executing carrier requests verification from the unauthorized carrier; notification is also given to the authorized carrier. If the verification is not provided within 15 days, the executing carrier returns the subscriber to the authorized carrier within 15 more days, and, if the executing carrier is also the billing carrier, within those 15 more days, credits subscriber bills for any payments made, and removes any unpaid amounts from the bills. Thus by the end of 30 days after the subscriber notifies a carrier, the whole problem should be resolved. The executing carrier receives recourse from the unauthorized carrier through the billing and collection arrangement. The unauthorized carrier is also liable to the authorized carrier in the amount of any payments it received for the slammed calls.

If the notice is provided to the unauthorized carrier, the unauthorized carrier must inform the executing carrier and the authorized carrier. This begins the 15 days for the unauthorized carrier to provide proof, as above. If notice is given to the authorized carrier, the authorized carrier will of course notify the executing and the unauthorized carrier.

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